In the

# United States Court of Appeals

## For the Seventh Circuit

**No. 10143**

UNITED STATES OF AMERICA EX REL. WILLIAM H. GIESE,

*Relator-Appellee,*

*vs.*

LIEUT. GENERAL STEVEN J. CHAMBERLIN, COMMANDING GENERAL OF THE FIFTH ARMY, AND COLONEL ALEXANDER H. CUMMINGS, COMMANDING OFFICER, FORT SHERIDAN, ILLINOIS,

*Respondents-Appellants.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

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## INDEX.


| | |
|---|---|
| Placita | 1 |
| Petition for Writ of Habeas Corpus, filed Dec. 13, 1949 | 2 |
| Order that Writ issue, entered Dec. 13, 1949 | 5 |
| Jurat for Petition for Writ of Habeas Corpus, filed Dec. 16, 1949 | 5 |
| Return to Writ of Habeas Corpus, filed Dec. 16, 1949 | 6 |
| Transcript of Proceedings | 10 |
| Relator's Exhibit No. 1—Honorable Discharge | 39 |
| Order discharging Relator, entered Dec. 16, 1949 | 41 |
| Notice of Appeal, filed Feb. 8, 1950 | 42 |
| Statement of Points | 43 |
| Designation of Record | 45 |
| Name of Appellee | 46 |
| Additional Designation of Record | 47 |
| Order re Exhibit | 48 |
| Clerk's Certificate | 48 |


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1 Pleas had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of December (it being the 5th day thereof) in the Year of Our Lord One Thousand Nine Hundred Forty-Nine and of the Independence of the United States of America, the 174th Year.

Present:

Honorable John P. Barnes, District Judge.
Honorable Philip L. Sullivan, District Judge.
Honorable Michael L. Igoe, District Judge.
Honorable William J. Campbell, District Judge.
Honorable Walter J. La Buy, District Judge.
Honorable Elwyn R. Shaw, District Judge.
Honorable William H. Holly, District Judge.
Roy H. Johnson, Clerk.
Thomas P. O'Donovan, Marshal.

Friday, December 16, 1949.

Court met pursuant to adjournment.

Present: Honorable Michael L. Igoe, Trial Judge.

2 IN THE UNITED STATES DISTRICT COURT.

For the Northern District of Illinois,

Eastern Division.

United States of America, ex rel. William H. Giese,
*Relator,*
*vs.*
S. J. Chamberlin, Fifth Army Commander, 1660 East Hyde Park Boulevard, Chicago, Illinois, and Alexander H. Cummings, Fifth Army, Commanding Officer, Fort Sheridan, Illinois,
*Respondents.*
No. 49-C-1903.

Be It Remembered, that on the 13th day of December, 1949, the above-entitled action was commenced by the filing of the following Petition for Writ of Habeas Corpus in the Clerk's office of the United States District Court for the Northern District of Illinois, Eastern Division, in words and figures following, to-wit:

3 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—49-C-1903) * *

## PETITION FOR WRIT OF HABEAS CORPUS.

To the Honorable Judges of Above-Entitled Court:

William H. Giese, above-named relator, by his attorney, Abner F. Bond, respectfully represents unto this Court:

1. That the above-named relator, a citizen of the United States of America, is now illegally and contrary to law, under arrest, restrained and deprived of his liberty by the above-named respondents.

2. That in March, 1930, your relator enlisted in the United States Army for a period of three years.

3. That in July, 1930, your relator went absent without leave from the United States Army.

4. That in 1935 or 1936, your relator tendered himself to the civil authorities, namely the Sheriff of McClain County, Illinois, at Bloomington, Illinois, as a deserter; that said Sheriff, seeking a $25.00 reward for deserters, notified the Federal authorities, namely the Federal Bureau of Investigation or the United States Army, reporting your relator's tender; that pending a response from said notification, said Sheriff held your relator in confinement; that, a few days subsequently, said Sheriff received a response from the Federal authorities, namely, the Federal Bureau of Investigation or the United States Army, stating that your relator was not wanted, whereupon your relator was released.

5. That in July, 1942, he was arrested by the Federal authorities and placed in Army custody at Fort Sheridan, Illinois.

6. That on March 16, 1944, he was inducted into the United States Army.

4 7. That on or about June 29, 1946, after twenty-one months overseas service, having been awarded three battle stars and having attained the rank of sergeant, your relator was honorably discharged from the United States Army.

8. That in July, 1948, your relator was arrested by the United States Army Military Police and granted partial liberty only on the condition that he report to them twice each week.

9. That since February, 1949, your relator has been taken into custody, placed under arrest and has been under restraint and/or confinement by order of an Army officer whose name is unknown, in the Post Guard House, Fort Sheridan, Illinois.

10. That said arrest, restraint, detention and deprivation of the liberty of the relator by the respondents is in violation of his rights under the Fifth and Sixth Amendments of the Constitution of the United States, in that he is deprived of his liberty without due process of law.

11. That at the times your relator was restrained by the Army Military Police and was taken into custody, he was and is now a private citizen, and he was not at those times and is not now a member of the United States Army or subject to the jurisdiction thereof.

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12. That S. J. Chamberlin is presently on active duty in the United States Army as Fifth Army Commander, 1660 East Hyde Park Boulevard, Chicago, Illinois.

13. That Alexander H. Cummings, Fifth Army, is presently on active duty in the United States Army as Commanding Officer of Fort Sheridan, Illinois, and that the Post Guard House in which your relator is incarcerated is under the direct control and supervision of said Commanding Officer.

Wherefore, your relator prays that a Writ of Habeas Corpus may be granted and issue, directed to above-named respondents, commanding them to produce the body of your relator before your Honor forthwith at a time and place to be specified, then and there to receive and do what your Honor shall order concerning the detention and restraint of your petitioner, and that your petitioner be restored to his liberty as a private citizen.

Abner F. Bond,
*Attorney for Relator.*

Abner F. Bond
10 S. LaSalle St.
STate 2-3872

5 State of Illinois } ss.
County of Cook }

Abner F. Bond, Attorney for the above-named relator, being duly sworn on oath, says that he has read the foregoing petition, has knowledge thereof, and that the statements and facts contained therein are true to the best of his knowledge and belief.

Abner F. Bond.

Subscribed and sworn to before me this 12th day of December, 1949.

Esther Corder,
*Notary Public.*

(Seal)

6 And on the same day, to wit, on the 13th day of December, 1949, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

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7 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—49-C-1903) * *

On motion of the relator, the Court being fully advised in the premises, it is

Ordered that Writ of Habeas Corpus issue instanter herein, as prayed in the Petition therefor, returnable before this Honorable Court on December 16, 1949, at 10:00 o'clock, A. M.

8 And afterwards on, to wit, the 16th day of December, 1949, came the Relator by his attorneys and filed in the Clerk's office of said Court his certain Jurat for Petition for Writ of Habeas Corpus in words and figures following, to wit:

9 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—49-C-1903) * *

## JURAT FOR PETITION FOR WRIT OF HABEAS CORPUS.

State of Illinois }
County of Cook } ss.

William H. Giese, relator in above-entitled cause, being duly sworn on oath, says that he has read the Petition for a Writ of Habeas Corpus, hitherto filed herein on December 13, 1949, by his attorney, Abner F. Bond; that he has knowledge of the statements and facts contained therein and that the same are true.

William H. Giese.

Subscribed and sworn to before me this 16th day of December, A. D. 1949.

Charles A. Sistek,
*Notary Public.*

(Seal)

Abner F. Bond,
*Attorney for Relator.*

*Attorney for Relator*
Abner F. Bond
10 South LaSalle Street
STate 2-3872

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10 And on the same day, to wit, the 16th day of December, 1949, came the Respondent, Colonel Alexander H. Cummings, Commanding Officer, Fort Sheridan, Illinois, by his attorneys and filed in the Clerk's office of said Court his certain Return to the Writ of Habeas Corpus in words and figures following, to wit:

11 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—49-C-1903) * *

## RETURN TO THE WRIT OF HABEAS CORPUS.

To the Honorable Michael L. Igoe, Judge of the District Court of the United States for the Northern District of Illinois.

Now comes the respondent Colonel Alexander H. Cummings, Commanding Officer, Fort Sheridan, Illinois, by his attorney, Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, and makes the following return to the writ of habeas corpus directed to him:

1. That the respondent denies the allegations set forth in paragraphs 1, 4 and 11 of the relator's petition.

2. That the respondent denies so much of paragraph 7 of the relator's petition which alleges that the relator was awarded three battle stars.

3. That the respondent denies the allegations set forth in paragraph 10 of the relator's petition, and states the fact to be that the relator has not been deprived of his liberty in violation of his rights under the Fifth and Sixth Amendments to the Constitution of the United States, and is not being deprived of his liberty without "due process of law".

12 4. The respondent admits the provisions of paragraph 12 of the relator's petition, but avers that same are immaterial in that Lieut. General Stephen J. Chamberlin has not been served with any court order in this cause.

5. The respondent admits paragraphs 2, 3, 5, 6, 8, 9 and 13 of relator's petition.

6. In obedience to the said writ of habeas corpus, the respondent herewith produces before the court the body of the said William H. Giese.

7. Your respondent respectfully alleges the facts and circumstances to be as follows:

That the relator enlisted in the United States Army, Company G, 59th Coast Artillery Corps, on or about February 2, 1926 and was discharged on or about February 1, 1929; that he reenlisted in the United States Army on or about March 12, 1930 for a period of three years; that he went absent without leave, without proper authority, on or about July 2, 1930, from the 3rd Infantry Division, Fort Snelling, Minnesota, and remained absent without proper authority and in desertion until August 1942, at which time he was apprehended and returned to military control at Fort Sheridan, Illinois; that on or about the 13th day of October 1942, pursuant to the Extension of Service Period Act, dated December 13, 1941 (hereinafter referred to), he was restored to duty at Fort Sheridan, Illinois, for the duration of the war plus six months; that on or about October 29, 1942, he was transferred to Company F, 362nd Infantry Regiment, 91st Infantry Division, Camp White, Oregon; that on or about March 15, 1943 he again went absent in desertion; that on or about March 16, 1944 he again enlisted, by way of induction into the Army; that on or about June 29, 1946 he was given an honorable discharge from the Army having served with the 746th Railway Operating Battalion.

13 That in July 1948, the Criminal Investigation Division of the United States Army contacted the relator, and, subsequently, after investigation placed him in arrest in February of 1949.

That pursuant to a court martial convened at Headquarters, Fifth Army, Chicago, Illinois, the relator was tried and convicted for the crime of desertion under the 58th Article of War and was sentenced as follows:

"To be dishonorably discharged the service, to forfeit all pay and allowances to become due after the date of the order directing execution of the sentence, and to be confined at hard labor at such place as the reviewing authority may direct for three years."

That thereafter the Commanding General of the Fifth Army reduced so much of the sentence as pertained to confinement to ten months, and mitigated the "dishonorable discharge" to a "bad conduct discharge".

That the said court martial record, findings and sentence have not been acted upon under the Army Review System or by the Judge Advocate General, which provides for a review of the record, findings, and sentence by a Board

of Review and approval by the Judge Advocate General of the United States Army.

8. It is respectfully submitted to the court that the following jurisdictional questions are herein involved, and if the court finds any one of them to be valid, it is sufficient for the Army to retain jurisdiction of the relator:

a. The respondent alleges that the relator's enlistment dated on or about March 16, 1944 was fraudulent under the provisions of 10 U. S. C. 1499 (Article of War 28) and 10 U. S. C. 1526 (Article of War 54), in that the relator willfully misrepresented and concealed his qualifications at the time of the enlistment as he did not reveal his former enlistment and desertion; it therefore
14 follows that the discharge which the relator received on or about June 24, 1946 is accordingly a fraudulent discharge.

b. The respondent alleges, assuming the discharge of June 24, 1946 to be valid, that that said discharge was only a discharge for the period of March 16, 1944 to June 24, 1946, pursuant to the provisions of 10 U. S. C. 1580 (Article of War 108), and respectfully states that that discharge did not affect the relator's discharge entered into on or about March 12, 1930 from which the relator was never discharged. Citing the Manual for Courts-Martial, United States Army, chapter 4, paragraph 10, pages 9 and 10.

c. The respondent alleges, again assuming the discharge of June 24, 1946 to be valid, that the said discharge in itself would not preclude the relator from being subject to court martial trial under the provisions of Article of War 94, 10 U. S. C. 1566 (Frauds Against the Government). Citing *Hirschberg* v. *Cooke*, 336 U. S. 210, 215; *Ex parte Joly*, 290 Fed. 858, 860.

d. The respondent further alleges that the relator has not exhausted his remedies under the Army Court Martial System and further states that the Board of Review and the Judge Advocate General of the United States Army has not acted on the court martial proceedings heretofore held at Fifth Army Headquarters, Chicago, Illinois; further that the relator has not sought a new trial, which he has a right to do and which is prerequisite to the exhaustion of his remedies. Citing 10 U. S. C. (Article of War 53), *Welchel* v. *McDonald, Warden*, 176 Fed. 2nd 260; *Spencer* v. *Hunter*, 177 Fed. 2nd 370.

9. The respondent further states that the relator's

constitutional rights were not violated and that he was accorded "due process of law" in that the Congress of the United States, pursuant to the Constitution, has promulgated statutes for the Government of the Army.

15 10. The relator neglected to aver in paragraph 5 of his petition that he was apprehended from his desertion in 1930, in August of 1942, and restored to full duty at Fort Sheridan, Illinois, on or about the 13th day of October 1942; that on or about the 29th day of October 1942, he was transferred and reassigned to the 91st Infantry Division at Camp White, Oregon; that he did absent himself in desertion on or about the 15th of March 1943 from his said place of duty at Camp White, Oregon.

It is submitted to the court that when the relator was restored to full duty at Fort Sheridan, Illinois, on or about the 13th day of October 1942, that same was done by a special Army order, pursuant to the provisions of "Territorial Use of Army and Extension of Service Period Act," dated December 13, 1941, which automatically extended the enlistment of Army personnel for the duration of the war plus six months.

Wherefore, your responednt having made a full and true return to the Writ of Habeas Corpus heretofore issued herein, prays that the said Writ of Habeas Corpus be discharged; that the petition for Writ of Habeas Corpus be dismissed, and that the relator be remanded to the custody of the respondent, to be dealt with according to the law of the United States of America.

Otto Kerner, Jr.,
*United States Attorney.*

16 State of Illinois, } ss.
County of Cook. }

Colonel Alexander H. Cummings, Commanding Officer, Fort Sheridan, Illinois, Respondent in the above entitled cause, being duly sworn upon oath states that, all and singular, the allegations herein contained are true as he verily believes.

Alexander H. Cummings.

Subscribed And Sworn to before me this 16th day of December, A. D. 1949.

Wm. Markheim,
*Notary Public.*

(Seal)

17 And afterwards on, to wit, the 16th day of March, 1950, there was filed in the Clerk's office of said Court a certain Transcript Of Proceedings Had on December 16, 1949, before Honorable Michael L. Igoe, Judge, in words and figures following, to wit:

18 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—49-C-1903) * *

## TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause taken before the Hon. Michael L. Igoe, one of the Judges of said Court, in his court room in the United States Court House at Chicago, Illinois, commencing at 10:00 a.m. Friday, December 16, 1949.

Appearances:

Mr. Abner F. Bond, appearing for Relator;

19 Mr. Otto Kerner, Jr., U. S. District Attorney, by: Mr. Melvin L. Klafter, Ass't U. S. District Attorney, appeared for Respondents.

20 The Clerk: Case No. 49 C 1903, United States of America, ex rel. William H. Giese, Relator, *vs.* S. J. Chamberlain and Alexander H. Cummings, return on writ of habeas corpus.

The Court: Is there to be a contest on this?

Mr. Klafter: If your Honor please, last Tuesday at the time this case was first presented your Honor made the return date today and we just got certain papers in the office yesterday morning, so it was almost impossible to get a return ready by today.

I believe, under the statute, we can have a little more time to ask the Court that the case be put over and return made next Tuesday or Wednesday, if possible, because by that time we can file a return.

Mr. Bond: I wish to protest strongly against that.

You will recall the main question here is whether the man is in the Army or not.

The Court: Yes.

Mr. Bond: And I suggested at that time that he could

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call up and find out whether he was discharged, as I have a copy of the discharge here that is sworn to and I also have a case here that is on all fours which shows that this man was really discharged.

The Court: It shows he was discharged in June, 1946?

21 Mr. Bond: Yes.

The Court: What are they holding him on?

Mr. Klafter: In the first place, the Government claims that this is a fraudulent discharge.

The Court: You say that this is a fraudulent discharge, what do you mean by that?

Mr. Klafter: Inasmuch as the enlistment was fraudulent, therefore the discharge was fraudulent.

The Court: How long was he in the Army?

Mr. Bond: This question was—

Mr. Klafter: Just a minute. Let me finish, please.

Mr. Bond: All right.

Mr. Klafter: This man originally enlisted in the Army in 1926. He was discharged in 1929. He again re-enlisted in 1930 and about two months after he re-inlisted he stayed absent in desertion until the military authorities picked him up in 1942, and then pursuant to the Service Extension Act, which automatically puts deserters and persons on enlistment in the status of soldiers, the man went back to duty in Fort Sheridan and was there transferred out to Camp White in Oregon and he went absent from there and stayed absent from that camp, and stayed away until by induction—and that is where we have to get our facts straightened out—he enlisted by induction

22 I believe in 1944, by way of induction, and that is the discharge there for the induction from 1944 to 1946.

The Court: This is all right, though?

Mr. Klafter: We still say that is a fraudulent discharge by reason of the fact that it was a fraudulent enlistment in 1944.

The Court: Here is a man with a certificate of discharge showing that he is properly discharged from the Army, the certificate of discharge with a testimonial of honest faithful services to his country, that certainly imports verity. I don't know how much further you can go.

Mr. Klafter: I believe that we can go behind it.

The Court: I seriously doubt that you can go behind it.

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Just how can you go behind a situation like that?

You mean the army can reach out and bring this man in here and say, "Under our rules the enlistment was fraudulent, the discharge was fraudulent and we are now going to punish him"?

Mr. Klafter: That is number one, number two in this matter is that that is only a discharge from 1944.

The Court: Do you mean to say that you are going to hold him for some military term before 1944?

Mr. Klafter: Yes, because there is another enlist-
23 ment and Congress has passed a statute, if the Court please, in the 108th Article of War which says a man will only be discharged for a specific contract period, and that contract period there is from 1944 to 1946, and on the original contract of enlistment, from 1930 on, he has never been discharged from that.

The Court: They knew about it at the time they issued this discharge.

Mr. Klafter: No, sir, and that is the reason why it is fraudulent.

And the serial number, every man is given a serial number when he enters the services, and the serial number on the discharge is different from the serial number on his previous enlistment.

The Court: What do you say about that?

Mr. Bond: I say, sir, here is a case, I do not agree with everything that he has said.

The Court: We are not going to decide everything right now.

Mr. Bond: Here is a case on all fours with this.

Mr. Klafter: That is the Drainer case, and that is different.

The Court: What is different about it?

Mr. Klafter: The Rules of Court Martial are a lot
24 different in the Army, the basic law, the Navy, if your Honor please, are still using the laws that they originally had and the Army has been amended from time to time pursuant to the Acts of Congress that have been promulgated even as late as last year.

Mr. Bond: I believe you can change the name Army to Navy and change the name Roberson to Giese and make your decision.

The Court: What time for your return do you wish?

Mr. Klafter: That is what I am asking your Honor.

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The Court: Make your return at two o'clock. This gets to a place where it is ridiculous, where they evidently attempt to put the Army and Navy over and above the law of this country. One other Judge around here ruled on some matter like this, and if the Army and Navy officials are going to continue to act like this, they are going to run head on with some of the Judges around here.

Continued to two o'clock and make your return at that time.

(Thereupon, an adjournment was taken in the above-entitled case to 2:00 o'clock p.m. of the same day, Friday, December 16, 1949.)

25 2:00 o'clock p.m.
Friday, December 16, 1949.

Court met pursuant to adjournment.

Appearances:

Mr. Bond

Mr. Klafter.

The Clerk: Case No. 49 C 1903, United States of America, ex rel. William H. Giese *vs.* S. J. Chamberlain and Alexander H. Cummings, return on writ of habeas corpus.

Mr. Klafter: If your Honor please, here is a return on the writ, and counsel has been served with a copy of that return.

26 The Court: Is that right?

Mr. Bond: That is right.

The Court: Very well, you may proceed.

Mr. Bond: In the return respondents admit the discharge but they allege that it was a fraudulent discharge because they allege that at the time of the induction relator did not reveal his previous enlistment in the Army. Of course, the relator denies any fraud, but for the purpose of settling this summarily, under the Habeas Corpus Act, I submit to your Honor that even, just assuming, that there was fraud under the cases, I show you right here in 69th Federal Supplement 661, at Page 664, a case on all fours.

Now, in that case, which is the case of *United States ex rel. Flannery* v. *Commanding General, Second Service Command et al.*, they say—it is a short case and is on four white feet with the situation here—it holds substantially

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that a discharge is not revocable or cancellable even for fraud.

The Court: Let me see if I understand what this case is all about.

From the standpoint of the Army you allege in your petition that in March, 1930, he enlisted in the Army for a period of three years.

27 Mr. Bond: Yes.

The Court: And in 1930 he went absent without leave.

Mr. Bond: Yes.

The Court: Then later on, in December, 1935, or 1936, he surrendered to the Sheriff of McLean County.

Mr. Bond: Yes.

The Court: Who contacted the officers of the United States Army and they reported that they did not want him?

Mr. Bond: That is right.

The Court: And then in 1942 he was arrested. In the meantime, had he enlisted again?

Mr. Bond: No, sir.

The Court: That 1942 arrest was for the 1930 desertion?

Mr. Bond: Yes.

The Court: And he was placed in the custody of the Army at Fort Sheridan and shipped out to Oregon and then he was absent from then until 1944.

Mr. Bond: No, I contend at that time he was no longer in the Army, and in 1942 he was illegally in the Army.

The Court: Well, anyway, in 1944 he went back into the Army?

Mr. Bond: Was regularly inducted.

The Court: And he served then until 1946?

28 Mr. Bond: Yes.

The Court: And was discharged, after being awarded three battle stars and after attaining the rank of sergeant.

Mr. Bond: And the respondent denies that he received three battle stars and alleges that the discharge was fraudulent. I submit that the question before your Honor now is the effect of the discharge.

The Court: Is the discharge, is that disputed as to its authenticity?

Mr. Bond: I offer it is evidence.

The Court: Does the Government say it is not authentic?

Mr. Klafter: That is a question, I will not say it is a good discharge, it is a discharge certificate, but predicated on fraud because of the fraudulent enlistment by way of induction in 1944, so it logically follows that the discharge is fraudulent.

The Court: You do not dispute the authenticity of this discharge?

Mr. Klafter: Not the execution of this certificate of discharge.

The Court. I am trying to get through my head just what went on, he went back into the Army in 1944 and finally was discharged in 1946?

29 Mr. Bond: Yes.

Mr. Klafter: If I may interpose, your Honor, I think I can straighten this matter out.

The Court: Yes.

Mr. Klafter: The first time he was in the Army was in 1926. He served that enlistment period from 1926 to 1929. He was discharged from the 1926 enlistment and re-enlisted in 1930. In 1930 he was absent in desertion and was never brought back to military control until 1942 at which time he was restored to duty pursuant to the Service Extension Act of 1941 which provides, in effect, that all persons subject to the Military, shall be brought back into the service for the duration of the war, plus six months.

He was restored to full duty here at Fort Sheridan, Illinois, and was sent to Camp White, I believe it is in Oregon, and went absent from that enlistment in 1943. In 1944 he was again enlisted by way of induction.

At the time of that induction he signed certain papers which I can show to your Honor—I will put them in evidence later on—where he never revealed his prior enlistment of 1930 or that he was ever discharged from that enlistment.

30 The Court: You knew about the 1943 difficulty?

Mr. Klafter: No, sir, we never knew about the desertion in 1943.

The Court: Don't you have fingerprint records or anything like that?

Mr. Klafter: If your Honor please, that was during the time of war and they did not discover that fraud until 1948 when the C. I. D. of the Army, through the fingerprinting department, found that there had been a fraud perpetrated.

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In furtherance of this I would like to say that his enlistment of 1930 assigned a different serial number to this relator than his enlistment of 1944.

The Court: What are they punishing him up there for now?

Mr. Klafter: Up there they are now punishing him for desertion.

The Court: Desertion only?

Mr. Klafter: From the 1930 enlistment. Here is the point, if the Court please—

The Court: Are there any statutes of limitations that bind the Army or are they above every kind of law?

Mr. Klafter: If the Court please, he was brought back into the Army in 1942.

31 The Court: That was twelve years later.

Mr. Klafter: He was brought back into the Army by an Act of Congress in 1942 which says all persons subject to the Military shall be brought back into service.

The Court: That is still twelve years after the 1930 situation, and even if it was an Act of Congress you mean to say that he is under punishment for this alleged violation that occurred in 1930?

Mr. Klafter: No, he is under—

The Court: That is what I asked you.

Mr. Klafter: Yes, but he is under punishment for the 1943 Act, when he took off.

The Court: I asked you a while ago about that.

Mr. Klafter: I probably did not make myself clear.

The Court: I think you made yourself clear because you said this action of 1942 made him amenable to that law.

Mr. Klafter: This man is charged with desertion as of March 15, 1943. That is what he is being charged with right now.

The Service Extension Act for the duration of the war plus six months was in effect from December 17, 1941, until July 25, 1947, and at that time Congress said for all of these types of purposes the war had ended, the emergency had ended.

32 So, actually the only time they could have really checked this man was from 1947 to 1948, when they did. They did every thing that was humanly possible to do so.

The Court: Are these the facts: after the second desertion in 1943, he got into the Army by enlistment, or by induction?

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Mr. Klafter: Yes.

The Court: And he did serve over two years?

Mr. Klafter: Until '46, yes, sir.

The Court: And he was then discharged?

Mr. Klafter: And he was then discharged but in giving him that discharge certificate the Army did not know, because of the fraud, as we contend, that he had been a deserter in 1943.

The Court: Now counsel makes reference to some cases here.

He makes reference to one case that is pretty good.

Mr. Klafter: The Flannery case?

The Court: No, the Drainer case.

Mr. Klafter: The Drainer case, and I would like to comment on that case with the Court's permission.

The Court: What is your comment?

33 Mr. Klafter: If your Honor please, there are two sets of statutes promulgated by the Congress, one for the Army and one for the Navy and they are quite different from each other.

The Army has a statute which says, in specific cases of this sort, that the man shall be guilty of desertion, and each successive enlistment is a fraudulent enlistment, and no such statute is in effect in the Navy.

The Court: You say this is based on the statute?

Mr. Klafter: Yes.

The Court: The Navy case?

Mr. Klafter: No, sir, the Navy case is based on regulations, and that was overruled because it was based on a regulation and not on a statute.

Now, the 108th Article of War, in 10 U. S. C. 1580—may I read that to the Court, it says:

"No enlisted man, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, signed by a Field Officer of the Regiment or other organization to which the enlisted man belongs or by the Commanding Officer when no such Field Officer is present; and no enlisted man

34 shall be discharged from said service before his term of service has expired, except by order of the President, the Secretary of War, the Commanding Officer of the Department, or by sentence of a General Court Martial."

The Court: You were just reading from the statute; how is that applicable to this?

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Mr. Klafter: It says specifically "no enlisted man shall be discharged from a period of enlistment." That is not for the same period of enlistment that he claims to have been discharged, that discharge says, if you will look at the second part of it, that runs from 1944 to 1946.

The Court: And I understand you admit that so far as that particular part of the service is concerned, that discharge may be all right.

Mr. Klafter: Yes, that discharge, but I say the discharge was fraudulent because—

The Court: And the position you take is that it does not discharge him from the previous enlistment?

Mr. Klafter: Yes, I say that is so because it was obtained through fraud.

I can go one step further on that, in *United States ex rel. Hirshberg*, 336 U. S., the Supreme Court specifically
35 said where there has been fraud perpetrated after the discharge, the enlisted man who perpetrated the fraud—

The Court: You do not allege any fraud after the discharge?

Mr. Klafter: I mean prior to the discharge.

The Court: You said after the discharge.

Mr. Klafter: Yes, but I meant prior to the discharge. He is still subject to the Military, if there is fraud in the discharge he can still be brought back.

The Court: He is still subject to that fraud?

Mr. Klafter: Yes, under the 94th Article of War.

The Court: How long do they keep control of people?

Mr. Klafter: As long as there is a fraud they can keep control of them, your Honor.

The Court: What does that state on it? I don't know just how a man will ever get out of the Army when someone might come along and say, "You did something fraudulent so you are still in the Army and we will pick you up."

Mr. Klafter: Reading from the 94th Article of War, 10 U. S. C. 1556, it enumerates a number of things down to the end and then it says there at the end:

"And if any person being guilty of any of the of-
36 fenses aforesaid while in the military service of the United States is discharged or is dismissed from the service, he shall continue to be arrested and held for trial and sentenced by a court martial in the same manner and to the same extent as if he had not received such discharge or been dismissed."

That is in the United States Code, if the Court please, and in addition to that the Manual of Court Martial prescribed by the President and approved by Congress,—which is the law for the Government and the Army—says, in Paragraph 10, Chapter 4, Page 9, if I may have the Court's indulgence, I think it is important—and I might differentiate at this time by saying to the Court that there is no provision in the Navy regulation, and that is where I think the distinction is in the Drainer case:

"The general rule to be followed in the Army is that court martial jurisdiction over officers, cadets, soldiers, and others in the military service of the United States ceases on discharge or other separation from such service and that jurisdiction as to an offense committed dur-
37 ing a period of service thus terminated is not revived by re-entry into the military service."

With these exceptions to the general rule:

"Jurisdiction as to certain cases of conspiracy, fraud and stealing is not terminated by discharge or dismissal," that is Article of War 94, and that is the one I referred to a minute ago.

"All persons under sentence adjudged by court-martial remain subject to military law while under sentence."

The Court: What are you reading from?

Mr. Klafter: I am reading from Manual for Courts Martial, U. S. Army.

The Court: That is the manual for Courts Martial but it is not a statute.

Mr. Klafter: It has the effect of a statute.

The Court: And that is what they say in the Navy case. It has the effect of a statute.

Mr. Klafter: The Navy case was based on a regulation as distinguished from the Army statute.

The Court: What fraud do you say this man committed against the Army?

Mr. Klafter: The first fraud committed was when
38 he enlisted, because there was a fraudulent enlistment by reason of the fact that he had been in desertion in 1943, and that all of the moneys he retained by reason of the services in the Army, payroll, family allowance, $10,000 worth of insurance, and $300 of mustering out pay, and all of his G. I. Rights that he got by reason of the G. I. Bills, that Congress gave to him, he has taken advantage of them and we say that is tantamount to a fraud.

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The Court: Is that what you base it on?

Mr. Klafter: Yes, sir, that is the fraud.

The Court: You do not think he did anything physically by which he defrauded the Government?

Mr. Klafter: No, sir.

The Court: Except he came back and wanted to serve in the Army again and did not reveal that he had previously enlisted and had previously deserted and that constitutes fraud which you say necessitates his punishment?

Mr. Klafter: This enlistment was by way of induction and I do not think the relator had anything to say about his going into the Army.

The Court: But he did go into the Army?

Mr. Klafter: Yes.

39 The Court: And he did serve?

Mr. Klafter: Yes.

The Court: And he did receive this discharge?

Mr. Klafter: Which I claim is a fraudulent discharge.

The Court: But despite your claim he did receive a discharge and did receive the recognition that is recited in the discharge?

Mr. Klafter: No, sir, the recognition was not in the discharge, it was in the petition of the relator's.

The Court: Wasn't it in the discharge?

Mr. Klafter: I say the recommendation you talk about in there, and which the relator says he got, they are simply campaign stars, battle campaign stars.

The Court: That is what it says here, "Victory Medal, European African Middle Eastern Theater Ribbon with one Bronze Battle Star, 3 Overseas Bars, Army of Occupation Medal, Good Conduct Medal."

Mr. Klafter: Overseas Bars are for terms of service, the bars were given for length of time in the service.

The Court: He is not attempting to enlarge upon this, and you do not say he did not get these recognitions.

Mr. Klafter: Overseas Bars, there is a great deal of difference between that and Army Service Bars.

The Court: What do you call a Bronze Battle Star?

40 Mr. Klafter: He has one right there.

The Court: What is a Victory Medal?

Mr. Klafter: Everybody who was in the Army at the termination of hostilities got it, or anybody who was in Europe.

The Court: This says a Victory Medal, European Afri-

can Middle Eastern Theatre Ribbon, Bronze Battle Star, 3 Overseas Bars, Army of Occupation Medal and Good Conduct Medal, and because he did not reveal his previous military history he thereby committed fraud against the government and all of this must be wiped out?

Mr. Klafter: Yes, there are cases that so state.

The Court: All right. Have you finished?

Mr. Klafter: Yes, sir.

Mr. Bond: Your Honor, I will be very brief.

We contend, naturally, that he did not fraudulently enlist or anything else, and that case right there, the Flannery case, that is the mile-stone and states that the proclamation of the President which set out that manual that counsel has cited and quoted to you here was restricted only for the purposes of courts martial proceedings and when they start talking about the effect of a discharge on previous enlistments and so on, that is not authorized
41 by Act of Congress to the President and consequently it is unconstitutional.

That case holds that an Act of Congress provided for courts martial after discharge by Presidential proclamation, namely, the Manual of Courts-Martial and that is the present power given to the Army to cancel a discharge for fraud and return him to being a soldier, and that that was repugnant to the enjoyment and right of trial by jury.

This is, as you see, a well reasoned and sound opinion, but I will wait until you finish perusing that, if I may.

The Court: No, go ahead.

Mr. Bond: Counsel cited the case of *United States ex rel. Hirshberg* v. *Cooke*, in the advance sheet, 69, No. 10, Supreme Court Reporter, Page 530. I just picked this up and I do not see the point in there, in fact that is a habeas corpus proceeding granting the writ of habeas corpus at the end of the case, and it says this:

"Since the Army and the Navy court martial powers depend on substantially the same statutory foundation"—this is a case involving a Navy man, incidentally—

—"the opposing interpretations cannot both be right
42 unless it be assumed that Congress has left each free to determine its own court martial boundary. We cannot assume that Congress intended a delegation of such broad power in an area which so vitally affects the rights and liberties of those who are now, have been, or may be associated with the Nation's Armed Forces."

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I do not think this case, inasmuch as it grants the writ, it reverses the Circuit Court of Appeals which denies the writ, is favorable to respondent's position.

I am ready to stand on the basis of the Flannery case, and inasmuch as they admit the discharge, and if the discharge is valid, according to the cases, I cannot see any reason why you cannot release the relator without going into the facts on the tender that I set up in my petition and which the respondent denies.

The Court: What tender?

Mr. Bond: I put in a tender in Paragraph 4.

The Court: That is where you say he surrendered down in Bloomington?

Mr. Bond: In 1930 a man enlists in the Army for three years and he goes absent without leave say after one year's service, and approximately five years later he tenders
43 himself to the Army through the civil authorities who are anxious to get the reward who naturally reports to the Federal authorities, however the situation is this, the two-year statute of limitations has run and if the Army tried to try him on the desertion he could plead the statute of limitations as a bar.

So, in effect they said "We don't want you, if we do you would plead the statute of limitations and therefore we don't want you."

It is petitioner's contention that two years after he made that tender he was out of his obligation to serve and out of the Army for all time.

It simply revolves around the interpretation of the Act of Congress.

The Act of Congress says a man is not out unless he receives a discharge or is otherwise separated from the service.

Was it the intent of Congress that this man who is now 43 years old and who, in 1935, at which time he was 23, went to the Army and said, in substance: "I owe you two years," and the Army said, "We don't want you now but may want you five years or ten years or fifteen years from now but we reserve the right to recall you at
44 any time after two years." I think not.

But it worked out so that in 1942,—and he had been in his home town all of the time so far as I know—he was picked up and brought to Fort Sheridan and the so-called restoration took place.

The Court: What happened then?

Mr. Bond: The Army has a regulation that a man can be restored to duty, and the only way you can go into the Army is by being picked up or by induction.

I put it to your Honor if in those two years after 1935, in 1938 or 1939 let us say, he was not discharged.

The Court: How did he get up to the Army in 1942 or 1943?

Mr. Bond: The Army authorities had him picked up by the F. B. I.

The Court: Then what happened?

Mr. Bond: They restored him to duty and had him sign his papers.

The Court: Then what happened?

Mr. Bond: Afterwards he stayed there a while and then in 1943 he left.

I say, even if the Army picked him up forcibly and restored him to duty that that had to be based on
45 a valid enlistment.

The Court: Then what happened?

Mr. Bond: He went home and on the 16th of March, 1944, he was inducted into the Army like anybody else and any fraud or anything that is alleged to have transpired since that time is denied.

The Court: He left the Army out in Oregon in 1942 or '43?

Mr. Bond: Yes, pursuant to the time he was brought back to Fort Sheridan, and restored. They said he was restored and following that, he left.

The Court: That was on the 1930 enlistment?

Mr. Bond: That is what the respondent says but petitioner claims that he, by his tender, he purged himself.

The Court: And he did not enlist again?

Mr. Bond: No, sir. We do not have to bother about tender and so on, which is denied by the respondent, all we have to go on, I submit under the cases I read to you, especially the Flannery case says that on a charge of fraudulent enlistment a discharge cannot be revoked.

The Court: I was just going to ask that simple question, how did the Army go about stirring up fraudu-
46 lent enlistments, do they have equity powers, or what?

Mr. Bond: I am not trying to say anything improper but not many writs are brought because while these men are innocent the persons do not know their rights in it.

I appeared before Judge Shaw on that sailor case and—

The Court: That answers that simple question. Here is a fraudulent discharge. Now they say; so can they go out and say it is fraudulent and that ends it? Don't they have to go into court and give a man a hearing?

Mr. Bond: These cases seem to think they should have.

The Court: That is the reason I ask the question. I do not know whether they are clothed with all of the powers of a court of equity.

Mr. Bond: I think in a large measure it is an effort to foreclose a hearing on the discharge and Judge Shaw commented on that.

The Court: Let me see if I understand it: this man is being held out at Fort Sheridan on the charge of going absent without leave back in 1930.

Mr. Bond: It was based on that enlistment. The period was alleged from March, 1943, to February, 1949.

The Court: That goes back to the 1930 enlistment
47 and you say thereafter that he did not go up there and enlist and was not inducted but that the Army just restored him?

Mr. Bond: They restored him under some regulation.

The Court: And thereafter he went absent without leave again?

Mr. Bond: Yes.

The Court: So I say it all goes back to the 1930 enlistment.

Mr. Bond: But for our purposes it is just the question of the discharge.

The Court: I understand that but the reason they claim they hold him up there is on account of the 1930 enlistment that he did not reveal that enlistment at the time he was inducted in 1944.

Mr. Bond: That is what they claim.

The Court: Is that the way you understand it?

Mr. Bond: That is the way I understand it, that is the way I understand they claim, but I also understand, under the cases, they have no right to hold him.

The Court: All right.

Mr. Klafter: If your Honor please, on that last point that counsel just made reference to, it was not by a regulation that this man was brought back in 1942.

48 The Court: He was brought back under an Act of Congress?

Mr. Klafter: Yes, he was brought back under an Act of Congress, the 50th Appendix, U. S. C., Section 731-732.

The Court: That was because he had been in the Army in 1930?

Mr. Klafter: Exactly, yes. The second point I would like to make is this: we deny anything definitely with reference to his tendering himself to the service in 1937. There is no proof on it and we definitely deny it, and I did in my return.

Counsel makes much ado about this Flannery case and goes into great length as to what it is all about and I would like to say this, that it was reversed in the Appellate Court.

I am now reading, if your Honor please, from the case of *Kronberg* v. *White*, in the 84th Fed. Sup. Page 392, at Page 394, the Court said:

"The Flannery case was reversed by stipulation in the Court of Appeals for the Second Circuit without opinion."

The Court: It does not do either one of you very much good then.

Mr. Klafter: No, except I say he makes much ado about it and it was reversed.

It is the Government's contention, if the Court please, that there are four jurisdictional questions involved here and if the Court finds any one of them to be the fact the man is still under Army jurisdiction.

The first one is that the respondent alleges that the relator enlisted on or about March 16, 1944, and that it was a fraudulent enlistment under the provisions of 10 U. S. C. 1499, Article of War 28, which says:

"Certain acts to constitute desertion. Any officer who, having tendered his resignation and prior to due notice of the acceptance of the same, quits his post or proper duties without leave and with intent to absent himself permanently therefrom shall be deemed a deserter."

Now, here is the pertinent point about it, your Honor:

"Any soldier who, without having first received a regular discharge, again enlists in the Army, or in the Militia when in the service of the United States, or in the Navy or the Marine Corps of the United States, or in any foreign army, shall be deemed to have deserted the service of the United States; and, where the enlistment is in one of the forces of the United States mentioned above, to have fraudulently enlisted therein."

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Also, under 10 U. S. C. Section 1526, the 54th Article of War, it says:

"Any person who shall procure himself to be enlisted in the military service of the United States by means of willful misrepresentation or concealment as to his qualifications for enlistment, and shall receive pay or allowances under such enlistment, shall be punished as a court martial may direct,"

which is exactly the case here. He concealed his former enlistment and made misrepresentations as I pointed out previously.

I have already pointed out to the Court in the Hirshberg case in the 336th U. S., the Supreme Court case, where he said the man was discharged, that in that case there was no question of fraud involved.

Your Honor commented on this case that Judge Shaw tried here the other day and in that case there was no question of fraud involved.

51 The Judge Advocate rendered a decision on the same point and he said,—and this is the Judge Advocate for the Army and not the Navy—in a digest of opinions of the Advocate General of the Army, 1912 to 1940, at Page 381:

"A member of the National Guard, District of Columbia, did not respond on August 5, 1917, to the draft under the President's proclamation of June 3, 1917, and was dropped as a deserter. He was drafted into the Federal service on October 11, 1918. He has now been honorably discharged. The present status of the soldier is that of a deserter from the Army of the United States. His honorable discharge released him only from the term of enlistment which he entered into by reason of his draft on October 11, 1918. It did not release him from his obligations under the draft of July 3, 1917 which became effective as to him on August 5, 1917."

There is a case right in point, that Judge Advocate General's decision.

Further, I would like to say to the Court that the judicial position of the Army is created in like manner

52 that this Court is created under Federal powers. It is a Federal court and as all Federal courts do, it extends comity one to the other. Army court martial regulations provide for review and for new trial, as in this case here.

I will say this to the Court, that the Navy does not have that procedure.

I submit to the Court that the relator has not exhausted his rights under the military court martial system. I cite the case of *Welchel versus McDonald*, 176 Fed. 2nd. at Page 260, where the Court said, at the bottom of Page 262 and at the top of Page 263:

"Habeas corpus to review the action of another court is in its nature extraordinary and will not be used, if available at all, until other remedies have been exhausted."

Then it goes on with a group of citations:

"Article 10, U. S. C. A. Section 1525, provides for the grant of a new trial or the vacation of a sentence for a good cause shown within one year after final disposition of a court martial case; and in cases involving offenses committed during World War II the application may be
53 made within one year after termination of the war. The action taken on such applications is expressly made binding on all courts of the United States. This remedy is much better adapted to reach justice than any within the power of the District Court on habeas corpus. That it has not been sought here is within itself a sufficient reason for non-interference."

And they affirmed the judgment of the lower court which denied the petition for the writ. That case was decided and affirmed, and that was a Fifth Circuit case from Texas.

I have a Tenth Circuit case which held absolutely the same way in the State of Kansas and that case is *Spencer versus Hunter*, 177 Fed. 2nd, Page 370.

I think it may be pertinent for the Court to know the provisions of the 53rd Article of War because it makes the decision of the military court martial binding on other courts.

"When a sentence of dishonorable discharge has been suspended until the soldier's release from confinement, the execution or remission of any part of this sentence shall, if the soldier be confined in the United States disci-
54 plinary barracks, or any branch thereof, be directed by the Secretary of War."

For those reasons, if the Court please, I submit to the Court that the writ of habeas corpus should be discharged and the petition dismissed and the relator be remanded to the custody of the United States Army.

Mr. Bond: Out of the District Attorney's own mouth

I will convince your Honor that if there was, assuming there was any fraudulent enlistment, it would not effect this discharge.

Do you remember the statute he read: "Any man fraudulently enlisting will be tried by a court martial and receive any punishment it may direct." What is the import of that?

The Army has jurisdiction of him. How did it get jurisdiction?

Answer: Because that enlistment was good, subsequently say he enlists fraudulently and he is tried by court martial and gets six months or whatever he gets, then what happens? He goes back and gets his discharge. Is that discharge fraudulent because he enlisted fraudulently? If there was any fraud, which I do not believe was set up, it still does not affect his discharge, that is,
55 out of his own mouth.

This issue of a tender to the Sheriff is one which you may have to try, if you cannot decide this on the basis of the discharge.

The discharge is a signed performance of an obligation and any fraud to it is remote and does not affect the discharge, if there was any fraud which we say there was not.

Suppose he proves fraud, how does that affect the discharge? I asked myself and I don't know and he does not tell us.

With reference to the Flannery case which was reversed, as he said, by agreement, that is a new one on me. The 1946 Columbia Law Review has a very exhaustive note about the case and has a footnote by the Advocate General which says this case was reversed by agreement in the Circuit Court of Appeals.

I searched the Circuit Court of Appeals and I could not find any memo or opinion on it of any kind. So I say let the record show that there was not any reversal at all by agreement, there might have been a settlement on it, and I think the import is, if anybody is going to make inferences from the record, that the Government did not
56 want to go up because if they had gone up they would have been defeated. That is for what it is worth.

I think the way the record stands the District Court's decision stands because it was not appealed.

I don't think his contention that we should wait for the President and Secretary of War to act is worthy of any reply.

These men, as I allege in my petition, first in 1942 went down and said "We want you" and they placed him in Army custody at Fort Sheridan, Illinois, and then in July of 1948 the relator was arrested by the United States Army Military Police and granted partial liberty only on the condition that he report to them twice each week and then they said "We will report to the War Department," and they then dragged him up to Fort Sheridan and he had a trial which finished on the 7th of July, 157 days ago today.

Since that time the record of that trial has been held up at the Fifth Army headquarters, and if it is going to be reviewed it has to go to Washington and go through the Board of Review, and all that, and I contemplate it would take six months or more before it reached a decision, so if they can do that to this boy, with a discharge in his hand, they can do that to me.

57 The cases that he cited, I was not familiar with them, but the cases all have dealt with due process. For example, under the 24th Article of War, that deals with his right against self-incrimination but oftentimes that right is violated and a man asks for a writ because he did not get due process, but he is still in the Army.

Here I allege that he is a private citizen with a discharge in his hand, just like I am and many others who have served. I do not think the civil courts are ready to surrender their power to the Army to that extent.

I am sure it is almost inconceivable when I have my discharge in my hand that they can say "No, we are going to take you into the military courts for a year and a half and you cannot get a habeas corpus in the meantime." That is incredible. I do not believe that is worthy of any thought at all.

In addition to that they say "You cannot get any appeal." And they say this man is military and so forth and cannot carry on the same as anybody else, to mean it is inconceivable he could not get a writ because he is in the Army.

58 I don't want to go over the same ground intentionally, and I want to straighten the situation out if I can so I would like to ask the question:

Your statute says a man can fraudulently enlist and then be tried by a court martial under the jurisdiction of the Army for a period which has gone by, and after he is tried and convicted he still is in the Army and after he has served his bat time and he gets his discharge, then is

that discharge fraudulent because of some fraud committed in the enlistment?

I say that is an answer, and I say the answer is no because it vacates the good entry into the Army and does not affect the discharge.

I want to stress again the proclamation statutes he read are passed on in the Flannery case and that case says a man has the right to a jury trial in the land and naval forces because if the Congress cannot empower the President to act, the Congress itself cannot extend court martial jurisdiction arising outside of the land and naval forces.

It is submitted that the law cited, especially the comparatively recent cases of ex parte Drainer and of Flannery not only support the relator's contention as precedent and irrefutable logic, but also on the grounds of public policy.

59 Where he is not in the Army or Naval forces they naturally try to seek his reinduction, and since reinduction for purposes of trial by court martial finds no basis in the Constitution, the only remaining basis to support the exercise of military law is that the hitherto valid discharge is a nullity.

In light of the conclusive character of a separation as terminating military status, this would amount to the utilization of a mere fiction to accomplish an otherwise unconstitutional end. The Federal courts have consistently refused to allow the use of a fiction to evade Constitutional provisions.

There can be no control or jurisdiction by the Army over the relator except by reason that he is bound to be in the Army service. This service was terminated by delivery of his discharge. The solemn act by the duly constituted representative of the Government in granting and delivering such discharge and terminating all relations between the relator and the Army should be upheld.

If the contention of the Government is to be sustained no man who has received such a discharge as is here involved would ever be able to ascertain whether he has been finally released from the service.

60 Your Honor, I think on the facts that you have before you and the cases you have before you the relator should be discharged.

Is the discharge admitted? May we have that labeled Exhibit 1 and have it received?

The Court: That is the discharge?

Mr. Bond: Yes.

The Court: All right.

(Which said document was marked as RELATOR'S EXHIBIT NO. 1 for identification and was thereupon received in evidence.)

Mr. Bond: I swore to the petition at first because the petitioner was out at Fort Sheridan, but I have here his jurat to the petition and I would like to ask it be filed instanter and I just gave a copy to the District Attorney.

The Court: I take it there is no objection to that?

Mr. Klafter. No objection to that.

The Court: All right.

Mr. Bond: I think that is plain.

I would like now to take the opportunity to review a few excerpts from the opinion in the case of United States
61 ex rel. James Joseph Roberson, relator, *versus* J. S. Keating, Commander of Naval Training Center, Great Lakes; that case, as counsel said, did not go on the question of a fraudulent discharge basis, in that case they were trying to revoke the discharge because of inadvertence so they said.

"From this it may be seen that an honorable discharge is an extremely valuable property right as well as a personal right, and to deprive a person of an honorable discharge is to deprive him of property rights, as well as civil rights and personal honor. To destroy such a certificate of title, if we wish to call it that, in an arbitrary way on a unilateral proceeding, is contrary to our ideas of democracy. This country depends upon a citizen Army and Navy, and the rights of citizens are only to be temporarily impaired, to the minimum extent consistent with national safety. To make the Army or the Navy with their court martial boards sole judge of whether a person is or is not a member of the armed forces, would be to destroy all civil rights which is unthinkable in a nation depending upon a
62 citizen army. It is perhaps deplarable that courts should interfere in any way with Naval affairs but when we come to the question of whether or not a citizen is or is not a member of the Navy, the point becomes basic and fundamental under our Constitution and must be judged by the civil courts. This can and must be done without interference with such necessary rules or regulations as may be laid down for disciplinary purposes, but no such disciplinary action can be taken unless a person actually is a member of the armed forces, and in that event any judgment rendered would be void."

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And then it goes on to say that this Naval discharge was delivered to him signed by an officer entitled to it and was recorded in the County Recorder's Office.

And then it goes on:

"I am not passing upon what the legal effect might have been had that discharge had been procured through fraud or by any wrongful act on the part of the relator. That question is not in this case, so far as this relator is concerned he fully performed his contract with the
63 Navy, received his honorable discharge and at that moment the books were closed so far as he was concerned. All of the things that are charged against him subsequent to that date are beyond the jurisdiction of a Navy court martial and are therefore void.

"The Court takes judicial notice of the fact that our country recently had armed forces of approximately ten million men and that many of those millions were discharged upon a so-called point system. In the working of this system it was necessary that the officers issuing discharges should depend upon company clerks and their division clerks to make the calculations necessary for discharge. It would be something passing a miracle if some mistakes were not made in calculating points and issuing honorable discharge. It could even be possible that some records may have been falsified and it is even conceivable that some point ratings were improperly obtained. In those cases of mistakes, which must have occurred, the man carrying an honorable discharge and entitled to be a
64 civilian would be subject to arrest and summary trial by the military if the position taken by the Navy in this case is sustainable."

And this is even more in point:

"It is my view that the clear-cut naked question of whether a man is or is not in the armed forces must be determined by the civilian courts under rules of due process.

"It follows that the orders of commitment under which this man is held are void and that the relator should be discharged."

And Judge Shaw over here says the import of this case shows it is not due process, but having decided it under a writ of habeas corpus it follows that the order is void and the relator should be discharged.

Now this is a question which would interest you and Judge Shaw. What would the Army do if they wanted to say the discharge is wrong because of fraud? Would

they go into a court of equity to clear the title or the deed or would they do something else?

Then it says:

"Other questions have been raised as to what procedure might or might not have been taken, and I am not
65 passing on those questions because they are not presently before me nor could they be in a habeas corpus proceeding."

Then he goes on:

"It was suggested in argument that some action might be taken against the certificate of discharge. I am doubtful of the ethicacy of any such action in view of the total absence of anything to indicate any wrong-doing on the part of the relator, but that is a separate matter and nothing said herein is to be deemed any ruling upon or in any way res judicata in such a situation, should it ever arise."

Now what can the Army do? Well, that is the Army's business, it is a fact on giving him a discharge he is entitled to due process on it, it is a property right and in the Constitutional construction that we are going to protect property rights we should bear even more so towards liberty. I think that is a sound rule of construction.

It is a simple thing, he is discharged. Then if the protestants claim that he was to be tried on the ground he is in the Army, wouldn't any discharge be futile and fraudulent and even if they would prove fraud under those
66 circumstances the Army cannot revoke it like a grantor deed. It has to have due process, and relator has not had due process, they have admitted the discharge.

The Court: I just want to get these dates straight.

Mr. Bond: O. K.

The Court: The discharge was dated in 1946, June 29, 1946 and he was inducted in 1944.

Mr. Bond: His induction card was dated March 16, 1944.

Mr. Klafter: But long before that he had been sent out to Oregon.

The Court: From the 1930 enlistment, in 1943 he was put back in the Army.

Mr. Bond: Actually in 1942 and he was brought to Fort Sheridan and subsequently shipped out to Oregon.

The Court: Out there he went absent without leave again?

Mr. Bond: If he was actually in the Army at that time.

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The Court: Whether he was in or out, he went absent without leave?

Mr. Bond: Then he would be lawfully absent.

The Court: Call it what you want to, he went away, what is the use of arguing about that, and then later on he is inducted in the Army under the usual process
67 of taking a man into the Army, that is the way he got in?

Mr. Bond: Yes.

The Court: And he had not been arrested as a result of his military establishment in Oregon?

Mr. Bond: No.

The Court: The next we hear of him was in 1944 when he is inducted in the Army?

Mr. Bond: Yes.

The Court: Thereafter he served and was thereafter discharged?

Mr. Bond: Yes.

The Court: Have you finished?

Mr. Bond: For the present.

The Court: What do you mean for the present? If you have anything else to say, now is the time.

Mr. Bond: I think I am entitled to the last say on this matter.

The Court: What have you, anything more to say?

Mr. Klafter: Yes. As he says, of course he is entitled to the affirmative.

The Court: It is his law suit.

Mr. Bond: I would like to close right now if I may.

Mr. Klafter: I would like to say one thing in commenting on the points that counsel has made, a couple of the
68 points that he has made, number one, the absent in desertion from Oregon was going from an infantry outfit and when he went in 1944 he went with a transportation battalion, although both served overseas.

The Court: And they are both in the Army, too.

Mr. Klafter: That is one of the points I would like to put in and also in commenting on the Robertson *versus* Keating case I would like to say this, that there was nothing with reference to fraud involved as counsel says, in that case, but 10 U. S. C. 1566 definitely states after a discharge is given a man can be brought back subject to military trial, and I think those two points are very, very important.

The Court: Without limitation?

Mr. Klafter: There is a limitation on it, yes, but the

limitation would start running as of the date of 1947. Of course I submit this to the Court that the question of limitation should not be decided by this Court, I think that is something for the court martial to decide.

I would like to say something more on the automatic re-enlistment pursuant to the Act of 1941, there have been cases cited on that particular statute, and this is the case of *ex parte Taylor*, 73 Fed Sup. 161 where the facts
69 are that he enlisted in 1938 and a short period thereafter went absent in desertion and he was returned pursuant to the automatic Extension Act of 1941, and stayed in that corp until about 1943, and then later was picked up in 1948 and he was tried by a court martial and the Court denied a writ of habeas corpus, and in that connection I would like to say there was an Act passed, an Extension Act passed by the Navy the same as there was for the Army in that case.

The statutes are very similar, and I will give them to the Court to show that that is the fact, and also that that part of the statute has been decided. There has been much ado about the difference between deception and fraud that is involved here, so I would like to read one part of this case to the Court because I think it is important.

This is the case of Hirshberg *versus* Cooke, in the 336th U. S. Supreme Court Reports at Page 215:

"But after elimination of certain provisions which would further have extended court martial jurisdiction, Congress left in the bill Section 3, now Naval Article 14 (Eleventh) which makes Naval personnel guilty of service fraud
70 subject to court martial after discharge or dismissal."

The Court: What is a service fraud?

Mr. Klafter: A service fraud would be a military fraud.

The Court: What do you mean by that?

Mr. Klafter: As distinguished from a civil action, in a military fraud you have something like desertion or leaving a post while on duty.

The Court: Would you say that this was a service fraud?

Mr. Klafter: A service fraud, yes, I would say that a service fraud would be taking money under false pretenses.

The Court: Just like any other fraud, but that is far from this case.

Mr. Klafter: The fact that he has taken military pay and accepted G. I. rights.

The Court: Now you are really stretching it, if he had gone in good faith, and you did not have his previous

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military record, then there was no fraud committed by him at all, and so far as taking military pay and accepting the G. I. bill of rights, don't you think the Army is trying to stretch this a little bit far when they are going into a case like this?

Mr. Klafter: No, sir.

The Court: You do not?

71 Mr. Klafter: No, sir, I sincerely mean that, the statute specifically argues that way. I would like to say this, I think every man in the Army who has been there for any length of time knows this, that is knows about this particular section from the Court Martial Manual.

The Court: Let us assume they know all about it. I still do not feel that that is the answer to my question as to whether or not you think the Army is going pretty far when they concern themselves with a case of this kind over twelve years old.

Mr. Klafter: It is the only way they can enforce discipline, if the Court please.

The Court: Well, it is almost eighteen years old now, and that is really going pretty far.

Mr. Klafter: Well, all I can do is to present the facts and argue the law.

The Court: Maybe that is the reason they have so many officers engaged in that kind of work, maybe that is the reason the tax payers are saying why all these court martials. There are a lot of other activities these men might be engaged in rather than carrying out cases like this which is almost nineteen years old. That is enough to shock most people when they even consider it.

72 Mr. Klafter: I might say that a man going in desertion would shock most people when they consider it.

The Court: I understand desertion in the military you make a distinction, that is, desertion in time of war and desertion in time of peace is two different things.

Mr. Klafter: This man went in desertion in 1943 in the height of the war from army infantry to a service battalion.

The Court: Then he came back and went into the Army?

Mr. Klafter: Was inducted in by force.

The Court: Went into the Army and served with an honorable record.

I do not think we need to go any further with the discussion on this matter.

This cause comes before us on a petition for a writ of

habeas corpus filed on behalf of the Relator and presents a definite clash between the Civil and Military Authorities, as to the rights of the citizens of this country.

Here is a man who is in the custody of the Officers of the United States Army out at Fort Sheridan and he comes into this Court and presents an authentic discharge from the Army of the United States dated June 28,
73 1946 showing that he honorably served his country in the Army and was properly discharged from the Army.

Just what authority the Army has now for his control is completely beyond me.

I think the law governing this matter is pretty well set forth in the Drainer case where it is stated:

"It is the general rule that a person is amenable to the military jurisdiction only during the period of his service, and once honorably discharged such honorable discharge is a formal, final judgment passed by the Government upon the entire military record of the person."

That fits this situation.

The charge has been made here that back in 1930 there was something irregular so far as this man was concerned after he enlisted in the Army, but, that thereafter he surrendered to the Sheriff down in McLean County and the Army officers said they did not want him; and, thereafter, under some statute which has been quoted here—the authority of which has been questioned by the Relator—he is placed back in the Army and shipped out to Oregon and
74 there he walks away from that Army facility. Thereafter he is inducted in the Army and serves for the period 1944 until discharged in 1946.

The charge is now made by the Government, representing the Army, that this is a fraudulent discharge.

I do not understand that the Army, through their court-martial authority have any jurisdiction to pass upon a question which is purely a question of equity.

Let us supppose this discharge is fraudulent. Isn't this man entitled to his day in court? Isn't he entitled to come into a civil court and have tested out the question of whether or not the officers in the Army gave him a proper certificate of discharge?

To say that almost nineteen years after an enlistment which began down somewhere in the country here the Army or the United States can still be litigating with this gentleman as to whether or not he was authorized to walk

away from some military facilities in the far distant past is to me, as I said a while ago, just a shocking situation.

This relator is discharged.

Mr. Klafter: Pursuant to Rule 26 of the Court of
75 Appeals, I ask that the Relator be remanded to the custody of the Military until such time as we can perfect an appeal.

The Court: What rule is that?

Mr. Klafter: Rule 26.

The Court: Of what?

Mr. Klafter: Of the Court of Appeals.

The Court: I never heard of that rule, did you?

Mr. Bond: I am not familiar with it. I know that Judge Shaw let the other boy out.

The Court: Let us get the rule.

Mr. Klafter: Rule 26 of the Court of Appeals, shall I read it to you?

The Court: Yes.

Mr. Klafter: Rule 26:

"Pending review of a decision refusing a writ of habeas corpus, the custody of the prisoner shall not be disturbed.

"Pending a review discharging a writ of habeas corpus, after it has been issued, the prisoner may be remanded to the custody from which he was taken by the writ, or detained in other appropriate custody, or enlarged upon recognizance, with surety, as to the court, or judge,
76 rendering the decision may appear fitting in the circumstances of the particular case."

The Court: I am familiar with that rule, that is where we either enlarge on recognizance or place him back in custody whichever we choose. There is nothing there that makes it mandatory on us.

Mr. Klafter: No, there is nothing there that makes it mandatory on you.

The Court: The Relator may be discharged upon entering into a bond in the sum of one hundred dollars and he may sign his own bond.

(Which were all of the proceedings had on the hearing of the above-entitled matter.)

RELATOR'S EXHIBIT NO. 1.

# Honorable Discharge

*This is to certify that*

WILLIAM H GIESE

36946911 SGT 746TH RY OPN. BN

**Army of the United States**

*is Honorably Discharged from the military of the United States of America.*

*This certificate is awarded as a testimonial of Honest and faithful Service to this country.*

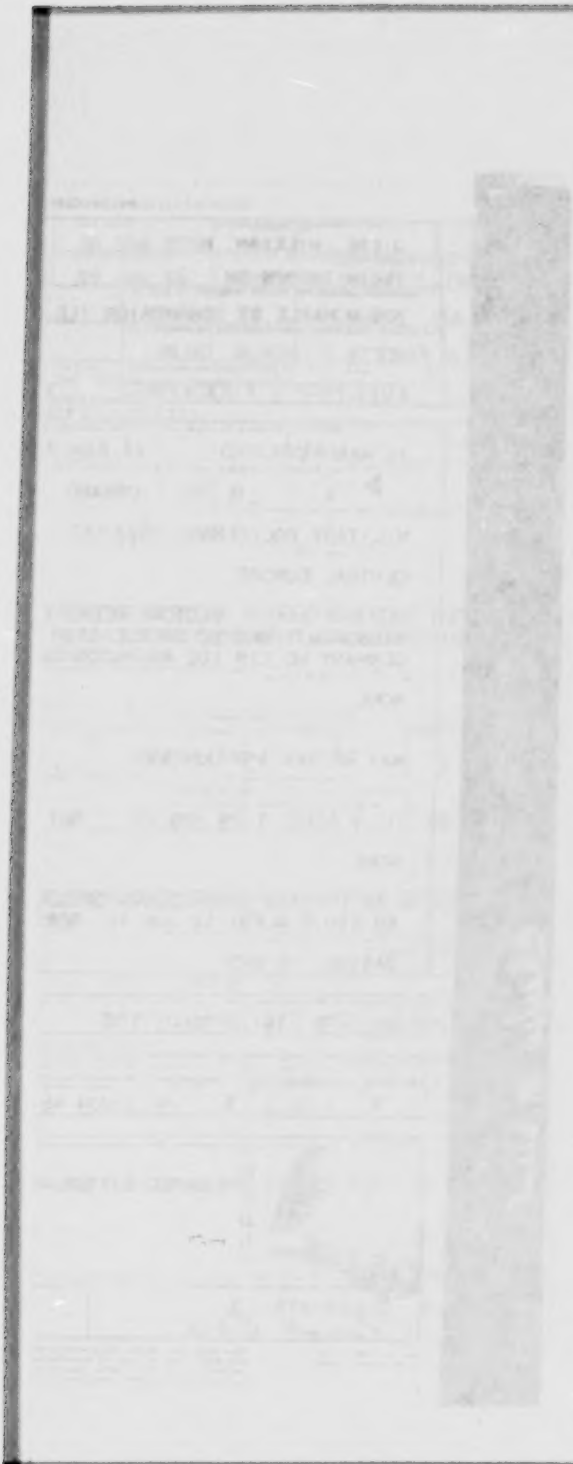
SEPARATION CENTER
FORT SHERIDAN ILLINOIS

29 JUNE 1946

C S Bender

C S BENDER
MAJOR FA

Acting Recorder of Deeds.



80 And on the same day, to wit, on the 16th day of December, 1949, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following, entry, to wit:

81 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—49-C-1903) * *

This cause this day coming on for hearing on the Return to the Writ of Habeas Corpus herein come the parties to this suit by their attorneys, respectively, come also the respondents and bring into open court the body of the relator and the hearing proceeds and the Court having now heard the arguments of counsel and being fully advised in the premises, finds that the relator, William H. Giese, is illegally held in the custody of the respondents and it is therefore

Considered and Ordered by the Court that the relator, William H. Giese, be and he is hereby discharged from the custody of the respondents, S. J. Chamberlin, Fifth Army Commander, and Alexander H. Cummings, Fifth Army Commanding Officer, and that pending an appeal from this decision the relator is hereby enlarged upon his own recognizance in the sum of One Hundred Dollars ($100.00).

82 And on, to wit, the 8th day of February, 1950, came the Respondents by their attorneys and filed in the Clerk's office of said Court their certain Notice of Appeal, in words and figures following, to wit:

83 IN THE UNITED STATES DISTRICT COURT.

For the Northern District of Illinois,

Eastern Division.

| | |
|---|---|
| United States of America, ex rel., William H. Giese, *Relator,* *vs.* Lieut. General Steven J. Chamberlin, Commanding General of the Fifth Army, and Colonel Alexander H. Cummings, Commanding Officer, Fort Sheridan, Illinois, *Respondents.* | No. 49 C 1903. |

NOTICE OF APPEAL.

The respondents, Lieut. General Steven J. Chamberlin and Colonel Alexander H. Cummings, hereby appeal to the United States Court of Appeals for the Seventh Circuit, from the order entered on December 16, 1949, by the United States District Court for the Northern District of Illinois, Eastern Division, discharging the relator.

Otto Kerner, Jr.,
*United States Attorney for the Northern District of Illinois.*

February 8, 1950.

(Certificate of Mailing Attached Hereto):

BLEED THROUGH POOR COPY

84 United States of America,
Northern District of Illinois. } ss.

CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that on February 8, 1950, in accordance with Rule 73 (b) of the Federal Rules of Civil Procedure a copy of the foregoing Notice of Appeal was mailed to

Abner F. Bond
10 S. La Salle St.
Chicago, Illinois

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, this 8th day of February, A. D. 1950.

Roy H. Johnson,
*Clerk,*

By Gizella Butcher,
*Deputy Clerk.*

(Seal)

85 And afterwards on, to wit, the 14th day of February, 1950, came the Respondent, Colonel Alexander H. Cummings by his attorneys and filed in the Clerk's office of said Court his certain Statement of Points on Appeal, in words and figures following, to wit:

86 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—49-C-1903) * *

RESPONDENT'S STATEMENT OF POINTS ON APPEAL.

Colonel Alexander H. Cummings, Respondent, by Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, will rely upon the following points on appeal:

1. The court erred in not discharging the Writ of Habeas Corpus.
2. The court erred in not dismissing the Writ of Habeas

Corpus and remanding the Relator to the custody of the respondent to be dealt with according to the laws of the United States of America.

3. The court erred in not finding that the United States Army had jurisdiction of the Relator.

4. The court erred in not finding that the Relator's enlistment on or about March 16, 1944 was fraudulent in that the Relator willfully misrepresented and concealed his qualifications at the time of the said enlistment as he did not reveal a former enlistment and desertion.

5. The court erred in finding that the Relator's discharge of June 24, 1946 was valid.

87 6. The court erred in finding that the Relator's discharge of June 24, 1946, was a valid discharge, and which discharge made all service prior to that date honorable, regardless of any fraud or wrongdoings theretofore perpetrated by the Relator during his entire military career.

7. The court erred in finding that the Relator's discharge of June 24, 1946, discharged him from his enlistment entered into on or about March 12, 1930.

8. The court erred in not finding that the United States Army had jurisdiction of the Relator after his discharge on June 24, 1946, for frauds perpetrated against the United States during the period of the Relator's former enlistment.

9. The court erred in not finding that the Relator should have first exhausted his remedies under the Army Court Martial System before pursuing his remedies in the United States District Court.

10. The court erred in not finding that the Relator's constitutional rights were not violated, and that he was accorded "due process of law" pursuant to the Constitution and the laws of the United States of America.

11. The court erred in not finding that the Relator deserted from the United States Army on or about the 15th day of March 1943, from his place of duty at Camp White, Oregon.

12. The court erred in not recognizing that on or about October 13, 1942, the Relator was properly returned to military control pursuant to the provisions of "Territorial Use of Army and Extension of Service Period Act", dated December 13, 1941; which Act automatically extended the enlistment of Army personnel for the duration of the war plus six months.

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13. The court erred in considering arguments preponded by the Relator which were beyond the scope of the Petition for the Writ of Habeas Corpus and the Respondent's Return.

88 14. The court erred in considering arguments preponded by the Relator which were contrary to the Respondent's Return and which were not traversed or otherwise denied by the Relator.

Otto Kerner, Jr.,
*United States Attorney for the Northern District of Illinois.*

89 And on the same day, to wit, the 14th day of February, 1950, came the United States of America by its attorneys and filed in the Clerk's office of said Court its certain Designation of Record in words and figures following, to wit:

90 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—49-C-1903) * *

## DESIGNATION OF RECORD.

The United States of America by Otto Kerner, Jr., United States Attorney for the Northern District of Illinois, designates the following portions of the record to be contained in the record on appeal in this cause:

1. Petition for Writ of Habeas Corpus.
2. Jurat for Petition for Writ of Habeas Corpus.
3. Respondent's Return to the Writ of Habeas Corpus.
4. Order entered December 13, 1949 issuing Writ of Habeas Corpus.
5. Transcript of Proceedings had on the morning of December 16, 1949.
6. Transcript of Proceedings had on the afternoon of December 16, 1949.
7. Order entered December 16, 1949, discharging the Relator, and enlarged upon his own recognizance.
8. Notice of Appeal filed on February 8, 1950.
9. Respondent's Statement of Points on Appeal.

91 10. Designation of Record on Appeal.

Otto Kerner, Jr.,
*United States Attorney for the Northern District of Illinois.*

State of Illinois }
County of Cook } ss.

PROOF OF SERVICE.

William Sheahan, being duly sworn, deposes and says that he deposited a copy of the foregoing Designation of Record in the United States Mail Chute at the United States Court House in the City of Chicago, Cook County, Illinois, enclosed in a Government franked envelope plainly addressed to Abner F. Bond, 10 South LaSalle Street, Chicago, Illinois, this 14th day of February 1950.

William Sheahan.

Subscribed and sworn to before me this 14th day of February, A. D., 1950.

Anna L. Minahan,
*Notary Public.*

(Seal)

92 And afterwards on, to wit, the 15th day of February, 1950, came the Relator-Appellee by his attorneys and filed in the Clerk's office of said Court his certain Names of Relator-Appellee and His Attorney of Record in words and figures following, to wit:

93 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—49-C-1903) * *

NAMES OF RELATOR-APPELLEE AND HIS ATTORNEY OF RECORD.

I hereby file, in accordance with Rule 10 (3) of the United States Court of Appeals, the name of the Relator-Appellee in the above-captioned matter: William H. Giese; and the name and address of the Relator-Appellee's attorney of record: Abner F. Bond, 10 South LaSalle Street, Chicago 3, Illinois.

Abner F. Bond,
*Attorney for Relator-Appellee.*

*Attorney for Relator-Appellee:*
Abner F. Bond
10 South LaSalle Street
Chicago 3, Illinois
STate 2-3872

BLEED THROUGH POOR COPY

94 And afterwards on, to wit, the 17th day of February, 1950, came the Relator-Appellee by his attorneys and filed in the Clerk's office of said Court his certain Additional Designation of Record on Appeal in words and figures following, to wit:

95 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—49-C-1903) * *

RELATOR-APPELLEE'S ADDITIONAL DESIGNATION OF RECORD ON APPEAL.

To the Clerk of the United States District Court for the Northern District of Illinois Eastern Division:

Now comes the Relator-Appellee, by his attorney, and pursuant to the Rules of Civil Procedure and hereby designates the following additional portion of the court proceedings and evidence to be contained in the record on appeal, to-wit:

Relator's Exhibit No. 1—a photostatic copy of honorable discharge issued to the Relator-Appellee by the Army of the United States.

Abner F. Bond,
*Attorney for Relator-Appellee.*

*Attorney for Relator-Appellee:*
Abner F. Bond
10 South LaSalle Street
STate 2-3872

Received a copy of the foregoing Relator-Appellee's Additional Designation of Record on Appeal this 17 day of February, 1950.

Otto Kerner, Jr., (by J. M.)
*U. S. Attorney.*

96 And afterwards, to wit, on the 20th day of February, 1950, being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

97 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—49-C-1903) * *

The Court being fully advised in the premises, on motion of the respondents by the United States Attorney, it is

Ordered that the relator's Original Exhibit No. 1, being a photostatic copy of the Honorable Discharge of said relator, be incorporated in the Record on Appeal in this cause and transmitted to the United States Circuit Court of Appeals for the Seventh Circuit as part of the Transcript of Record on Appeal in lieu of a copy thereof.

98 United States of America }
Northern District of Illinois } ss:

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with the Designations filed in this Court in the cause entitled: United States of America, ex rel., William H. Giese, Relator, *vs.* Lieut. General Steven J. Chamberlin, Commanding General of the Fifth Army, et al., Respondents, No. 49 C 1903, as the same appear from the original records and files thereof now remaining among the records of the said Court in my office, except the Relator's Original Exhibit 1 which is incorporated herein by direction of this Court.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 17th day of March, 1950.

Roy H. Johnson,
*Clerk.*

(Seal)

By Gizella Butcher,
*Deputy Clerk.*

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

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I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed transcript of record, filed May 22, 1950, in:

Cause No. 10143.

United States of America, *ex rel.*, William H. Giese,
*Relator-Appellee,*

*vs.*

Lieut. General Steven J. Chamberlin, Commanding General of Fifth Army, Colonel Alexander H. Cummings, Commanding Officer, Fort Sheridan, Ill.,
*Respondents-Appellants.*

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, this 8th day of November, A. D. 1950.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Court of Appeals for the Seventh Circuit.*

At a regular term of the United States Court of Appeals for the Seventh Circuit, held in the City of Chicago and begun on the fourth day of October, in the year of our Lord one thousand, nine hundred and forty-nine, and of our Independence the one hundred seventy-fourth:

| | |
|---|---|
| United States of America, *ex rel.*, William H. Giese, *Relator-Appellee,* 10143 *vs.* Lieut. General Steven J. Chamberlin, Commanding General of the Fifth Army and Colonel Alexander H. Cummings, Commanding Officer, Fort Sheridan, Illinois, *Respondents-Appellants.* | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. |

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And afterwards, to-wit, on the twenty-first day of March, 1950, there was filed in the office of the Clerk of this Court an Appearance of counsel for Appellee, which said Appearance is in the words and figures following, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

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Cause No. 10143.

U. S. A., *ex rel.*, William H. Giese,
*Relator-Appellee,*

*vs.*

Lieut. General Steven J. Chamberlin, etc., *et al.*, etc.,
*Respondents-Appellants.*

The Clerk will enter my appearance as counsel for Appellee.

Abner F. Bond,
10 South La Salle Street.

Endorsed: Filed Mar. 21, 1950. Kenneth J. Carrick, Clerk.

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And afterwards, to-wit, on the twenty-fifth day of September, 1950, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

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Monday, September 25, 1950.

Before:

Hon. F. Ryan Duffy, Circuit Judge,
Hon. Philip J. Finnegan, Circuit Judge,
Hon. Walter C. Lindley, Circuit Judge.

| | |
|---|---|
| United States of America, *ex rel.*, William H. Giese, *Relator-Appellee,* 10143 *vs.* Lieut. General Steven J. Chamberlin, Commanding General of the Fifth Army and Colonel Alexander H. Cummings, Commanding Officer, Fort Sheridan, Illinois, *Respondents-Appellants.* | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. |

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of record and the briefs of counsel and on oral argument by Mr. John Peter Lulinski and Mr. Melvin L. Klafter, counsel for the appellant, and by Mr. Abner F. Bond, counsel for the appellee, and the Court takes this matter under advisement.

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And afterward, to-wit, on the fifth day of October, 1950, there was filed in the office of the Clerk of this Court the opinion of the Court, which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

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No. 10143. October Term and Session, 1950.

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United States of America, *ex rel.*, William H. Giese, *Relator-Appellee*, *vs.* Lieut. General Steven J. Chamberlin, Commanding General of the Fifth Army and Colonel Alexander H. Cummings, Commanding Officer, Fort Sheridan, Illinois, *Respondents-Appellants.* } Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

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October 5, 1950.

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Before DUFFY, FINNEGAN and LINDLEY, *Circuit Judges.*

DUFFY, *Circuit Judge.* This is an appeal from an order entered by the district court on a petition for a writ of habeas corpus, discharging the relator, William H. Giese, from custody of the United States Army.

Relator enlisted in the United States Army about February 2, 1926, and was discharged February 1, 1929. He re-enlisted about March 12, 1930, for a period of three years, but deserted on July 2, 1930. Years later he was apprehended and was returned to military control in August, 1942, and pursuant to the Extension of Service Period Act of December 13, 1941 (55 Stat. 800), he was restored to duty on October 13, 1942, at Fort Sheridan for the duration of the war plus six months.

On or about March 15, 1943, relator again deserted. About one year later, on March 16, 1944, he was inducted into the service of the United States Army. On June 29, 1946, he was given an honorable discharge in the usual form. After an investigation by the Criminal Investigation Division of the Army, relator was placed under arrest in February of 1949 for desertion from the Army in March, 1943.

A general court martial was convened at headquarters, Fifth Army, in Chicago, Illinois, and the relator was tried and convicted of desertion under the 58th Article of War (10 U.S.C. 1530), and was sentenced to be dishonorably discharged, to forfeit all pay and allowances, and to be confined at hard labor for three years.

Under established procedure the proceedings whereby relator was court martialed would be reviewed by the commanding general of the Fifth Army. Before he did so the relator filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Illinois. Before that court held the hearing on the petition the Commanding General announced as the result of his review that the sentence of confinement was reduced to ten months and the "dishonorable discharge" mitigated to a "bad conduct discharge." Thereafter a hearing was had in the district court, which granted the writ and discharged the petitioner, the relator herein, from custody of the Army.

Although it is the law in this circuit that in granting or denying a writ of habeas corpus the judge or court should make findings of fact and state conclusions of law (*Wood* v. *Howard*, 7 Cir., 157 F. 2d 807, 808; *Tucker, at al.* v. *Howard*, 177 F. 2d 494, 497), findings and conclusions were not entered herein. It is apparent, however, from the remarks of the judge at the hearing, that the basis of his action was that by issuing the honorable discharge to relator, he felt the Army had passed upon relator's entire military record.

Article of War 47 (10 U.S.C. 1518) provides in part:

> "(c) Action on record of trial.—Before acting upon a record of trial by general court-martial or military commission, or a record of trial by special court-martial in which a bad-conduct discharge has been adjudged and approved by the authority appointing the court, the reviewing authority will refer it to his staff judge

advocate or to The Judge Advocate General for review and advice; and no sentence shall be approved unless upon conviction established beyond reasonable doubt of an offense made punishable by these articles, and unless the record of trial has been found legally sufficient to support it.

"(d) Approval.—No sentence of a court-martial shall be carried into execution until the same shall have been approved by the convening authority: ***

Article of War 50(e) (10 U.S.C. 1521) provides in part:

"(e) Action by board of review in cases involving dishonorable or bad conduct discharges or confinement in penitentiary.—No authority shall order the execution of any sentence of a court-martial involving dishonorable discharge not suspended, bad-conduct discharge not suspended, or confinement in a penitentiary unless and until the appellate review required by this article shall have been completed and unless and until any confirming action required shall have been completed. Every record of trial by general or special court-martial involving a sentence to dishonorable discharge or bad-conduct discharge, whether such discharges be suspended or not suspended, and every record of trial by general court-martial involving a sentence to confinement in a penitentiary, *** shall be examined by the Board of Review which shall take action as follows: ****"

Thus the district court assumed jurisdiction, granted the writ of habeas corpus, and discharged the relator before the record of the trial by court martial was acted upon by the reviewing authority and before the record was forwarded to the office of the Judge Advocate General for further appellate action.

Article of War 53 (10 U.S.C. 1525) became effective February 1, 1949,[1] and provides that any person con-

1. Article of War 53. Petition for new trial. Under such regulations as the President may prescribe, the Judge Advocate General is authorized, upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence, and substitute for a dismissal, dishonorable discharge, or bad conduct dis-

victed of an offense committed during the period of World War II has one year from the termination of the war, or within one year after final disposition of a case upon initial appellate review, whichever is later, to make his application.

Respondents point out that the provisions in the Manual for Courts Martial, prescribed by the President for the guidance of the Army, and the long established and consistent interpretation of Articles of War by the Army should have great weight with this court in deciding the issues before us, and cite the recent case of *Hiatt* v. *Brown*, 339 U.S. 103. The interpretation referred to is that an honorable discharge is a release from and terminates only a particular contract of enlistment; that an honorable discharge does not relieve a soldier from the consequences of a desertion committed during a prior enlistment. In the case at bar the honorable discharge certificate granted to the relator refers to the period of enlistment as March 16, 1944, to June 29, 1946.

The members of this court as well as those administering the affairs of the armed forces, and those directly interested in the outcome of this case, would prefer a decision on the issues herein on the merits. However, the question of jurisdiction has been directly raised, and it must be given first consideration.

Where, as here, habeas corpus constitutes a collateral attack upon a judgment, the general rule is that it may not be resorted to until after the exhaustion of other available remedies. *Ex Parte Hawk*, 321 U.S. 114; *Goto* v. *Lane*, 265 U. S. 393. The situation most often presented is that of a petitioner confined by State process

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charge previously executed a form of discharge authorized for administrative issuance, in any court-martial case in which application is made within one year after final disposition of the case upon initial appellate review: Provided, that with regard to cases involving offenses committed during World War II, the application for a new trial may be made within one year after termination of the war, or after its final disposition upon initial appellate review as herein provided, whichever is the later: Provided, That only one such application for a new trial may be entertained with regard to any one case: And provided further, That all action by the Judge Advocate General pursuant to this article, and all proceedings, findings, and sentences on new trials under this article, as approved, reviewed, or confirmed under Articles 47, 48, 49, and 50, and all dismissals and discharges carried into execution pursuant to sentences adjudged on new trials and approved, reviewed, or confirmed, shall be final and conclusive and orders publishing the action of the Judge Advocate General or the proceedings on new trial and all action taken pursuant to such proceedings, shall be binding upon all departments, courts, agencies, and officers of the United States.

who files an application for a writ of habeas corpus in a federal court without first having exhausted his State court remedies. *White* v. *Ragen*, 324 U.S. 760; 28 U.S.C. 2544. In recent months this court has repeatedly held that although a petitioner has exhausted all other State remedies, the remedy of habeas corpus is not available to him until he has also complied with the Illinois Post Conviction Remedies Act, Smith-Hurd Stats., 1949, Chap. 38, Sec. 826, which became effective August 4, 1949. *United States, ex rel. De Frates* v. *Ragen*, 181 F. 2d 1001; *United States, ex rel. Peters* v. *Ragen*, 178 F. 2d 377; *United States, ex rel. Hamby* v. *Ragen*, 178 F. 2d 379.

Before the district court would have jurisdiction to hear relator's petition for a writ of habeas corpus, he must first have exhausted his appellate remedies under Articles of War 47, 50 and 53, as hereinbefore set forth. It has been so held as to Article 53 in the Tenth Circuit in *McMahan* v. *Hunter*, 179 F. 2d 661, and in *Spencer* v. *Hunter*, 177 F. 2d 370; and in the Sixth Circuit in *Schilder* v. *Gusik*, 180 F. 2d 662[2]; and in the Fifth Circuit in *Whelchel* v. *McDonald*, 176 F. 2d 260[2], in *Hiatt* v. *Burchfield*, 179 F. 2d 679, in *Hiatt* v. *Fugate*, 179 F. 2d 679, in *Hiatt* v. *Jackson*, 179 F. 2d 680, the last three being per curiam opinions. Two district court cases in *Georgia* are to the same effect. *Sinclair* v. *Hiatt*, 86 F. Supp. 828; *Olsen* v. *Hiatt*, 89 F. Supp. 174.

In the case at bar the relator not only did not exhaust his last available military remedy provided in Article of War 53, but even filed his petition for writ of habeas corpus before the completion of the initial stages of the court martial review proceedings.

The order discharging relator from the custody of respondents is reversed, with instructions to dismiss relator's petition for writ of habeas corpus, to discharge said writ and remand relator to the custody of respondents, such action, however, to be without prejudice to the right of relator to file a new application for writ of habeas corpus following exhaustion of indicated administrative remedies under the Articles of War.

REVERSED AND REMANDED.

2. The Supreme Court has granted certiorari in the Schilder and Whelchel cases, 339 U. S. 977.

And on the same day, to-wit, on the fifth day of October, 1950, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

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Thursday, October 5, 1950.

Before:

Hon. F. Ryan Duffy, Circuit Judge,
Hon. Philip J. Finnegan, Circuit Judge,
Hon. Walter C. Lindley, Circuit Judge.

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| United States of America, *ex rel.*, William H. Giese, *Relator-Appellee,* vs. Lieut. General Steven J. Chamberlin, Commanding General of the Fifth Army and Colonel Alexander H. Cummings, Commanding Officer, Fort Sheridan, Illinois, *Respondents-Appellants.* | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. |
| 10143 | |

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed and Remanded.

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And afterwards, to-wit, on the twenty-fifth day of October, 1950, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

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Wednesday, October 25, 1950.

Before:

Hon. F. Ryan Duffy, Circuit Judge.

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| United States of America, *ex rel.*, William H. Giese, *Relator-Appellee*, vs. Lieut. General Steven J. Chamberlin, Commanding General of the Fifth Army and Colonel Alexander H. Cummings, Commanding Officer, Fort Sheridan, Illinois, *Respondents-Appellants.* | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. |

10143

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On motion of counsel for the relator-appellee, it is ordered that the issuance of the mandate of this Court in this cause be, and the same is hereby, stayed pursuant to the provisions of Rule 25 of the Rules of this Court.

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And afterwards, to-wit, on the first day of November, 1950, there was filed in the office of the Clerk of this Court a designation for Supreme Court Record which said designation is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

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No. 10143.

| | |
|---|---|
| United States of America, *ex rel.*, William H. Giese, *Relator-Appellee,* *vs.* Lieut. General Steven J. Chamberlin, Commanding General of the Fifth Army and Colonel Alexander H. Cummings, Commanding Officer, Fort Sheridan, Illinois, *Respondents-Appellants.* | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. Honorable Michael L. Igoe, Presiding Judge. |

DESIGNATION FOR SUPREME COURT RECORD.

Relator-Appellee will petition the Supreme Court of the United States for a Writ of Certiorari to review the judgment of this Court dated October 5, 1950, which is adverse to Relator-Appellee.

You will therefore please prepare and certify the following to the Supreme Court of the United States:

1. The entire printed transcript of record as filed in this Court on May 22, 1950.
2. Appearance of attorney for Relator-Appellee.
3. Hearing notes.
4. The opinion and judgment of this Court dated October 5, 1950.
5. Order re staying of mandate.

Abner F. Bond,
*Attorney for Relator-Appellee.*

Abner F. Bond,
10 South La Salle Street,
Chicago, Illinois.

Received a copy of the above Designation for Supreme Court Record.

Otto Kerner, Jr.,
*U. S. Attorney.*

Endorsed: Filed Nov. 1, 1950. Kenneth J. Carrick, Clerk.

BLEED THROUGH POOR COPY

UNITED STATES COURT OF APPEALS

**For the Seventh Circuit,**

**Chicago 10, Illinois.**

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I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of papers filed and proceedings had, made in accordance with the designation of record, filed November 1, 1950, in:

Cause No. 10143.

United States of America, *ex rel.*, William H. Giese,
*Relator-Appellee,*

*vs.*

Lieut. General Steven J. Chamberlin, Commanding General of the Fifth Army, and Colonel Alexander H. Cummings, Commanding Officer, Fort Sheridan, Ill.,
*Respondents-Appellants,*

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 8th day of November, A. D. 1950.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Court of Appeals for the Seventh Circuit.*

[fol. 62] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. —

UNITED STATES OF AMERICA, EX REL. WILLIAM H. GIESE, Petitioner,

vs.

LIEUT. GENERAL STEVEN J. CHAMBERLIN, etc., et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be and the same is hereby extended to and including March 3rd, 1951.

Sherman Minton, Associate Justice of the Supreme Court of the United States.

Dated this 28th day of December, 1950.

[fol. 63] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 564

UNITED STATES OF AMERICA, ex rel. WILLIAM H. GIESE, Petitioner,

vs.

LIEUT. GENERAL STEVEN J. CHAMBERLIN, Commanding General of the Fifth Army, et al.

ORDER ALLOWING CERTIORARI—Filed April 9, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.